

REMARKS

In light of the above amendatory matter and remarks to follow, reconsideration and allowance of this application are respectfully solicited.

**The Finality of the Office Action Should be Withdrawn**

In the Final Office Action under reply, claims 1-24, all the claims that were presented in this application, were rejected in view of Hennes (U.S. Patent 6,665,985). Claims 1, 3, 7-9, 12, 13 and 21-24 were stated by the Examiner to be anticipated by Hennes and claims 2, 4-6, 10, 11 and 14-20 were asserted to be obvious in view of Hennes. Interestingly, in the prior Office Action, the Examiner took the position the claims 1, 3, 7-9, 12, 13 and 21-24 were obvious in view of the combination of Hennes and Weinblatt (U.S. Patent 4,483,681). In response to that prior Office Action, Applicants amended claims 1, 7, and 21-24 by adding limitations to these claims. Now, however, the Examiner contends that, whereas these claims, in their broader form could not be anticipated by Hennes (hence, the combination of Hennes and Weinblatt to reject the broader claims), by adding limitations to these claims, the more limited claims now are anticipated by Hennes -- and Weinblatt no longer is needed.

It is respectfully submitted that the rejection of claims 1, 7 and 21-24 as being anticipated by Hennes could have been made in the prior Office Action. Hence, the new ground of rejection, based solely on Hennes, cannot be attributed to and was not necessitated by Applicants' last amendment. Rather, this new ground of rejection is attributed solely to the Examiner's adoption of a new theory of rejection. It is improper to make a second rejection final if, as here, it is not necessitated by Applicants' amendment of the claims. It simply is not logical to contend that it is Applicants' amendment that necessitated a change in the rejection of the claims from one of

obviousness in view of two references, to a rejection based on anticipation by only one of those references, especially where, as here, the claims are narrowed.

Therefore, the withdrawal of the finality of the Office Action under reply and the entry and consideration of the present amendment are respectfully solicited.

**The §102 Rejection Based on Hennes Should be Withdrawn**

Claim 18 is canceled and claims 1-17 and 19-24 are presented for further consideration. It is respectfully submitted, these claims, and especially the independent claims, are patentably distinct over Hennes and are in condition for allowance.

The present invention is concerned with determining an audience response to, for example, displayed content, by detecting the overall state of the audience, detecting the individual states of members of the audience by detecting individual load conditions of the members, and using the combination of the detected overall state, the detected load conditions and auxiliary information that indicates the content that currently is displayed to estimate whether the determined audience response is one of a predetermined number of types of responses. See, for example, the response types J1 to J5, discussed at, inter alia, paragraphs [0170] to [0175] of the published version of the instant application. This is particularly claimed in claim 1 -- and this is not contemplated by Hennes. Claim 1 recites:

detecting individual load conditions of the members of the audience, thereby representing the individual states of the members of the audience

supplying auxiliary information indicating the content currently displayed;

determining the audience response on the basis of the detected overall state of said audience, the detected load conditions of said members, and said supplied auxiliary information, ... for estimating whether the determined audience response is one of a predetermined number of types of responses.

These features are not found in Hennes. Hennes describes a computer-driven show control system 500 that includes sensors 510 for sensing the action of an audience, such as audience motion or sound, to alter the display of the program in accordance with the data derived from sensors 510 to thereby enable the audience to influence the display of subsequent images (Hennes, col. 6, lines 26-45). The similarity between Hennes and Applicants' claimed invention starts and ends with influencing the display of images by sensed action of the audience.

Hennes uses motion-sensors or beam-interrupt devices to detect general audience motion and position, and microphones receive audience sounds (col. 6, lines 45-49). The show control device 520 (Hennes Fig. 5A) is fed with information from the sensors to control the program to be played.

Arguably, Hennes determines the audience response to displayed images. But, Hennes does not detect individual load conditions of audience members to thereby represent the individual states of those members. Nor does Hennes use information indicating the displayed images, which, for example, is recited in Applicants' claim 1 as "auxiliary information indicating the content currently displayed," along with the detected overall state of the audience and the detected load conditions of audience members to estimate whether the determined audience response is a particular type. This is what is called for by claim 1 and this is not found in Hennes.

It is respectfully submitted, it is an unwarranted strain and unsupported stretch to contend that Hennes' use of auxiliary information indicating the content currently displayed is inherent in this reference. Hennes changes his images without regard to what those images happen to be. Hennes' images are changed "in response to audience motions and/or sounds" (col. 6, lines 62-64) without any consideration whatsoever of those images themselves. The displayed images of

Hennes are not used by his show control device 520 or any other device, *in combination with* the detected overall state of the audience and the detected load conditions of audience members to determine audience response. Contrary to the assertion at page 3 of the Office Action under reply, col 7, lines 1-13 of Hennes simply do not support the conclusion that Hennes' audience response determination "must consider the current state of playback of content." One of ordinary skill in the art, after reading and understanding Hennes, would not reach this conclusion.

Claim 1 also calls for detecting individual load conditions of the audience members. Hennes detects audience motion, position and/or sound. He does not detect the load conditions of individuals. The Examiner recognizes that Hennes does not detect individual loads, but takes official notice that it is well known in the art to use load bearing sensors to detect movements of audience members. Applicants' representative traverses this allegedly well known feature. The Examiner has not pointed to any prior art to support his official notice. While Applicants do not dispute that load sensors are known, why would one use load sensors to represent the states of audience members? It is Applicants who suggest this unique use of load sensors to detect individual load conditions and thereby represent the individual states of audience members.

It has been held that there is reversible error when the Examiner relies upon official notice for the particular features claimed which are urged to be novel in the combination claimed and to therein contribute new or improved results. *Ex parte Nouel*, 158 USPQ 237 (Bd of Pat. App. and Int. 1967). See also, 37 CFR 1.104(c)(3):

- (3) In rejecting claims the examiner may rely upon admissions by the applicant, or the patent owner in a reexamination proceeding, as to any matter affecting patentability and, insofar as rejections in applications are concerned, may also rely upon facts within his or her knowledge pursuant to paragraph (d)(2) of this section.

(d) Citation of references.

\*\*\*

(2) When a rejection in an application is based on facts within the personal knowledge of an employee of the Office, the data shall be as specific as possible, and the reference must be supported, when called for by the applicant, by the affidavit of such employee, and such affidavit shall be subject to contradiction or explanation by the affidavits of the applicant and other persons.

Applicant's representative requests the Examiner provide support for his reliance upon official notice; and if the Examiner is relying upon facts within his personal knowledge, an affidavit to that effect is requested.

For these reasons, claim 1 is not anticipated by Hennes, nor is this claim rendered obvious by Hennes. Accordingly, the withdrawal of the rejection of claim 1 is respectfully requested.

Claims 7 and 21-24 are independent claims that include many of the same limitations found in claim 1 and discussed above. For example, claim 7 calls for detecting individual load conditions of audience members, using the detected load conditions along with the detected overall state of the audience and with the auxiliary information indicating the currently displayed content to estimate whether the determined audience response is a particular type of response. In addition, claim 7 controls the operation of the content playback means based on the type of audience response that is determined. Although Hennes selects images in response to audience motions and/or sounds (col. 6, lines 62-64), there is no suggestion in this reference to estimate the type of audience response and to control images in response to that type of audience response.

Accordingly, Hennes is not capable of anticipating Applicants' claim 7; and the withdrawal of this rejection is respectfully requested.

Claim 21 is directed to the method performed by the apparatus of claim 1; and claim 22 is directed to the method performed by the apparatus of claim 7. The aforenoted elements of claims 1 and 7 are recited in claims 21 and 22, respectively. Hence, claims 21 and 22 are patentable over Hennes for the reasons discussed above.

Claim 23 is directed to a data recording medium on which is recorded a program that performs the method of claim 21. Similarly, claim 24 is directed to a data recording medium on which is recorded a program that performs the method of claim 22. Since claims 23 and 24 thus recite the same elements found in claims 21 and 22, claims 23 and 24 are patentable over Hennes for the reasons discussed above.

Claims 2-6 depend from claim 1 and, by reason of their dependencies, incorporate the recitations of claim 1. Claims 2-6 thus are patentable over Hennes for the very reasons presented above. Turning to claims 4-6 in particular, it has been argued heretofore that there is no reason for one of ordinary skill in the art, absent the hindsight gleaned from Applicants' specification, to install load sensors to the seats of the audience or to detect left foot and right foot stepping forces of each member of the audience. That technology exists to detect such forces and loads is not sufficient, by itself, to modify Hennes in the manner proposed by the Examiner. There simply is no teaching, reason or even common sense suggestion that would lead to the Examiner's reconstruction of Hennes.

Claims 8-17 and 19-20 depend from claim 7 and, by reason of their dependencies, incorporate the recitations of claim 7. Claims 8-17 and 19-20 thus are patentable over Hennes for the very reasons presented above. Turning to claims 11 and 13 -15, the Examiner contends at page 4 of the Office Action under reply, with particular reference to claim 13, that Hennes discloses "reduction means for reducing the effect of sound data played back by and output from

“said playback means” at col. 7, line 14 to col. 8, line 2. Applicants’ representative respectfully disagrees with this characterization of Hennes. At best, Hennes describes a surround sound system to create sound effects, such as “panning” the whale sound. But, Hennes fails to describe any means whatsoever to reduce the effects of the sound coming from the speakers on the collected sounds coming from the audience. It could very well be the case that Hennes cannot accurately detect audience sounds because of the sounds coming from his speakers. It would be unwarranted hindsight to reconstruct Hennes, based upon Applicants’ teachings, to improve this defect of Hennes.

The Examiner, at page 6 of the Office Action under reply, addresses Applicants’ claimed reduction of the effect of the video data played back from Applicants’ claimed playback means on the image of the audience (see claim 11). Here, the Examiner again relies on col. 7, line 14 to col. 8, line 2 of Hennes for an alleged teaching of such video reduction to improve the accuracy of detecting the overall bodily state of the audience. But Hennes apparently does not take into account a loss of accuracy in detecting audience motion that may be caused by the very images he projects. Thus, it is not surprising to find that Hennes provides no suggestion for reducing this effect.

At page 7 of the Office Action, the Examiner attempts to address the features recited in Applicants’ claims 14 and 15. Claim 14 recites that the overall state of the audience is detected by comparing the collected sounds with a reference sound level; and claim 15 states that the reference sound level is varied on the basis of the audience size. The Examiner admits that Hennes does not disclose these features, but takes official notice that it would be obvious to do so. Applicants’ representative disagrees with this attempt to find a teaching of a missing element in Hennes by relying on official notice. Why would Hennes even attempt to utilize sound

reference levels? At best, he simply detects sounds and, apparently, is not concerned with how the detected sounds compare to a reference level. To contend that Hennes' silence leads to official notice that it would be obvious to add to Hennes a particular feature with which he is not interested is unwarranted.

The foregoing argument is equally applicable to the rejection of claim 16, which claims the use of a filter to pass a predetermined audio band from which the overall state of the audience is detected. There is no suggestion in Hennes to do this. It is submitted that the Examiner relies on the hindsight gained from Applicants' disclosure to modify Hennes in a manner not contemplated by the patentee.

Therefore, Applicants respectfully request the withdrawal of the rejection of claims the dependent claims, and particularly the rejection of claims 11 and 13-16.

It is respectfully submitted claims 1-17 and 19-24, all the claims remaining in this application, are in condition for allowance. The issuance of the Notice of Allowance is earnestly solicited.

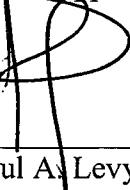
Statements appearing above in respect to the disclosures in the cited references represent the present opinions of the undersigned attorney and, in the event the Examiner disagrees with any of such opinions, it is respectfully requested that the Examiner specifically indicate those portions of the references providing the basis for a contrary view.

Please charge any additional fees that may be needed, and credit any overpayment, to our  
Deposit Account No. 50-0320.

Respectfully submitted,

FROMMER LAWRENCE & HAUG LLP  
Attorneys for Applicants

By \_\_\_\_\_

  
Paul A. Levy  
Reg. No. 45,748  
(212) 588-0800